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In The

Supreme Court of the United States

October Term, 1997

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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I. PETITIONERS' COMMON LAW CLAIMS ARE NOT EXPRESSLY PRE-EMPTED

"[I]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the *plain wording* of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (emphasis added). Respondent argues at length (Br. Resp. 14-33) that the Boat Safety Act *expressly* pre-empts the common law claims brought by Petitioners. The "plain wording" of the Boat Safety Act does not support this assertion; it only expressly pre-empts "a law or regulation" promulgated by a state in certain situations, while also providing that "compliance with [the Act or its regulations] does not relieve a person from liability at common law or under State law." 46 U.S.C. §§ 4306, 4311(g).

What Respondent really asks this Court to do is *imply* that "common law" was intended to be subsumed into the terms expressly chosen by Congress to convey its pre-emptive intent ("a law or regulation" in section 4306), and then to simultaneously *imply* that Congress intended an unstated limitation when it expressly saved "liability at common law" in section 4311(g). To accomplish this, Respondent relies on cases interpreting statutes with substantially different pre-emption provisions (Br. Resp. 22-25) to first urge that "common law" is always equivalent to "a law or regulation," and then assert that the savings clause "has nothing to do with preemption." Br. Resp. 15. As shown below, the linguistic implications urged by Respondent are inconsistent with the text, purpose, and history of the Boat Safety Act.

A. Section 4306 Does Not Pre-empt the Claims Asserted By the Lewis Family.

1. Section 4306 only pre-empts positive law.

1. Under section 4306, the only type of state action subject to pre-emption is "a law or regulation" which is established, continued, or enforced by a State or political subdivision of a State. The term "a law" – expressed by

Congress in the singular – is plainly a reference to statutory enactments of legislative bodies; "a law" is not the way anyone would refer to general duties that give rise to damages liability. Importantly, Congress has repeatedly demonstrated its ability to expressly refer to "common law" when it intends to pre-empt it. *Compare* statutes referenced at Br. Pet. 25. Indeed, the express reference to "common law" in the Act's savings clause (section 4311[g]) shows that Congress was cognizant of common law *in this very piece of legislation* yet did not include it in section 4306. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *See, e.g., Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994) (internal quotation marks omitted).

Moreover, "[l]anguage . . . cannot be interpreted apart from context." *Smith v. United States*, 113 S. Ct. 2050, 2054 (1993). Here the term "a law" in section 4306 does not stand in isolation, but rather as a counterpart to the word "regulation," which is a prescriptive requirement promulgated by an administrative rather than legislative body. Indeed this Court in *Cipollone* repeatedly noted that the word "regulation" is a reference only to positive law and **not** to common-law duties or damages liability. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519, 523 (1992).

Thus if "a word is known by the company it keeps," *Brown v. Gardner*, 115 S. Ct. 552, 555 (1994) (*citing Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 [1961]), and if we are to adhere to this Court's oft-stated "assum[ption] 'that the legislative purpose is expressed by the ordinary meaning of the words used,' " *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (*quoting Richards v. United States*, 369 U.S. 1, 9 [1962]), the phrase "a law or regulation" as used in this Act cannot plausibly be read to encompass the damage claims in Petitioners' suit.

2. The terms "a law" and "a . . . regulation" are then further *narrowed* by section 4306's description of the *specific kinds* of "law[s] or regulation[s]" that may not be "establish[ed]" (namely, certain safety standards or equipment

requirements). Section 4306 is thus entirely different from the pre-emption provision of the 1969 act at issue in *Cipollone*, relied upon by Respondent, which broadly pre-empted any "requirement or prohibition" under "state law." 505 U.S. at 515. Section 4306, by contrast, contains no broad reference to pre-empting the whole body of "state law" which can be construed to cover the common law. Rather, it narrowly refers only to "a law or regulation" which "establish[es] a recreational vessel or associated equipment performance or other safety standard or impos[es] a requirement for associated equipment. . . . " 46 U.S.C. § 4306.

3. Congress consistently uses the term "standard" in this Act to refer to enacted regulations. *See* 46 U.S.C. §§ 4302(a)(1), (a)(2); 4304; 4311(f)(1), (f)(2). Since "a word is presumed to have the same meaning in all subsections of the same statute," *Morrison-Knudsen Constr. Co. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983), "standards" in section 4306 must refer to state positive law.

The use of the phrase "or requirement for associated equipment" does not reach damages liability either. Absent any contrary intent on the face of the statute, because the word "requirement" is simply a type of "a law or regulation" contained in a series of items that manifestly do **not** include damages liability, there is no reason to believe Congress intended it to cover tort liability in such an offhand way. Thus, the pre-emption provision here uses "requirement" in a very different context from those acts relied upon by Respondent. *See Cipollone*, 505 U.S. at 515 (pre-empting a "requirement or prohibition"); *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2248-2249 (1996) (only pre-empting "requirement[s]"). Since a word is known by the company it keeps, "requirement" should not be given a meaning drastically at odds with the other words in the series. *Brown*, 115 S. Ct. at 555; *see United States v. Burke*, 504 U.S. 229, 243-244 (1992) (separate opinion of Scalia, J.).

4. Section 4306 also provides that a State or political subdivision of a State "may not establish, continue in effect, or enforce" certain state boat safety standards or equipment requirements. These terms again refer to positive law and not

damages actions in their common parlance. In interpreting these phrases, a "court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985).

2. Section 4306 does not pre-empt the actions of a judge or jury.

1. Section 4306 *only* forbids "a State or political subdivision of a State" from undertaking certain activities. Thus, to prevail, Respondent must also show that a jury award is issued by a "State or political subdivision of a State" within the meaning of section 4306. In common parlance, one would not describe a civil jury – whose principal functions are to assess liability and apply the common law – as "a State or political subdivision of a State." Indeed, a criminal jury is the principal **barrier** between a defendant and the State, rather than an arm of the state itself. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 & n. 23 (1968). Likewise, a civil judge and jury stand between the state and its citizens when the state is itself a party to a lawsuit.

This description would thus be a very unusual and awkward way to refer to a judge. *Compare Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (Age Discrimination in Employment Act, 29 U.S.C. § 630[f], needed to "plainly" refer to judges for it to apply to them; reference to an "appointee at the policymaking level" insufficient). Respondent's reading is even more strained here, as it would force this Court to conclude that a **federal** judge or a **federal** jury constitute a "State or [its] political subdivision" when a state common law suit is removed to federal court. It is no answer that the federal jury or judge in a tort case would be applying state law. Section 4306 refers to a "State" or its "political subdivision" as the **entities** that establish "a law or regulation." **Federal** juries and judges simply do not have that role in state tort actions.[1]

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[1] As the Solicitor General notes, Respondent's construction of the Act would compel judges to apply to the Coast Guard under section 4305 for authority to continue a damages action. *See* U.S. Br. 19. Given the absurdity of this result, the most plausible reading of section 4306 is that it only requires executive officers of a State or political subdivision to apply for permission to "establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard." U.S. Br. 18-19.

2. Under section 4306, the only actor which can create "a [pre-empted] law or regulation" is a "State or political subdivision of a State." Under the 1969 act in *Cipollone*, by contrast, the pre-emption provision does not refer to the organs of state authority that impose "requirements"; rather, it broadly encompasses any "requirement . . . imposed under State law." *Cipollone*, 505 U.S. at 515 (quoting statutory language). Thus while the Court could broadly interpret "requirements" in *Cipollone* to include common law, a similar conclusion cannot be reached in the Boat Safety Act. Simply stated, common law may possibly be considered a "requirement . . . imposed under State law," while common law cannot be considered a "requirement" "establish[ed]" through "a law or regulation" instituted by "a State or political subdivision of a State." Even were there ambiguity on that question (as in *Gregory*), in light of the presumption against pre-emption, the requisite plain statement to pre-empt state tort claims is absent from the text of section 4306. *Gregory*, 501 U.S. at 467.

3. Section 4306 only pre-empts a law or regulation which conflicts with "a regulation prescribed under section 4302."

As shown in our initial brief (Br. Pet. 16-24) and in Part II.B. below, section 4306 contemplates pre-emption only when a properly enacted federal regulation has been established; it says nothing about pre-emption in the absence of federal action. This silence is telling since Congress was aware of product liability lawsuits at the time the Act was drafted, *see* Br. Pet. 6-7, yet did not provide a clear and manifest intent to pre-empt them in the absence of a federal regulation on point. Likewise, the Coast Guard was also

aware of propeller guard lawsuits at the time it considered whether to undertake regulatory action, App. 50-53, yet it never urged their pre-emption in the absence of a federal regulation on point either. "In the absence of a promulgated safety standard, the Act simply fails to address the need for [the safety device] at all." *Freightliner*, 115 S. Ct. at 1486. Common law claims concerning propeller guards are thus not pre-empted by the express terms of section 4306.

B. The Savings Clause of the Act Confirms that the Lewis' Claims Are Not Expressly Pre-empted.

While the legislative history shows an expressed intent to maintain common law actions, *see* Br. Pet. 6-7, Respondent has not produced any provision which simply states that "we intend to pre-empt common law." Rather, Respondent constructs a pre-emption argument by stretching the ordinary meaning of the terms in the pre-emption clause to cover common law claims (dispelled above) and then implying an unstated limitation into the savings clause to read it out of the Act. This result is inconsistent with the normal canon of statutory construction to give effect to every clause. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

1. Section 4311(g) is a savings provision which limits the pre-emptive scope of this Act.

1. The Act's savings provision, section 4311(g), states that "[c]ompliance" with standards or regulations issued under the Act "does not relieve a person from liability at common law or under State law." Respondent would have this Court believe that section 4311(g) "has nothing to do with preemption." Br. Resp. 15. To the contrary, the savings clause was a specific Congressional subcommittee amendment to "ma[k]e clear that this Act does not preempt state or common law." *See* Br. Pet. 6-7. Indeed, Respondent acknowledges that

the Congressional bill specifically referred to this section as the "Savings Provision" of the Act. Br. Resp. 7-8.[2]

Respondent's explanation for the savings clause's purpose is as unpersuasive as its recitation of legislative history is incomplete. Respondent contends that the savings clause merely provides that if a manufacturer undertakes an obligation, it must do so correctly or face potential liability. Br. Resp. 31-32. This reading renders section 4311(g) a nullity, since state law already recognizes that compliance with a legislative enactment does not prevent a finding of negligence where a reasonable person would take additional precautions. *See* RESTATEMENT (SECOND) OF TORTS § 288(C) (1965); *see also, Banks v. ICI Americas, Inc.*, 264 Ga. 732, 737 n. 6, 450 S.E. 2d 671, 675 n. 6 (Ga. 1994) (under Georgia law, "a manufacturer's proof of compliance with . . . federal regulations does not eliminate conclusively its liability for its design of allegedly defective products"). Thus under Respondent's limited reading, the savings clause only provides for that which the law already provides. Since it would be redundant for Congress to supply that which was already in the background established law, it must be assumed that Congress meant to accomplish something by this provision.

Respondent's interpretation also leads to the untenable position that negligent compliance through *adding* a propeller guard could constitute an actionable tort under the Act, while negligent compliance through *withholding* a guard does not. *See* Br. Resp. 32; Br. Resp. In Opp. 14, n. 8. **Congress stated no such distinction in the Act.** Moreover, a finding that a propeller guard was negligently installed or manufactured would (according to Respondent's logic) necessarily create a

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[2] The presence of section 4311(g) further distinguishes this case from *Cipollone*, where the plurality relied on the **absence** of a savings provision as evidence that the statute at issue there pre-empts **some** damages actions. *Cipollone*, 505 U.S. at 523 n. 22. *Cipollone* also noted that the savings provision of the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4406 – whose wording is similar to section 4311(g) – broadly preserves damages actions. *Cipollone*, 505 U.S. at 518; *see also, id.* at 537 n. 2 (separate opinion).

common law "requirement" as to the proper materials, testing limits, design, quality, installation specifications, warnings, etc. concerning the propeller guard which was actually installed. Respondent would then presumably argue that such a common law action was also pre-empted since, like the claim for failure to provide propeller guards, the common law would purportedly coerce a "requirement" on Respondent which is "not identical to a regulation." Br. Resp. 16. Respondent's interpretation thus collapses under its own weight.

2. Respondent claims (Br. Resp. 29-30) that, because section 4311(g) refers to "State law" as well as "common law," it would render section 4306 a nullity if it were given the anti-preemptive effect that Petitioners place on it. But section 4311(g) speaks of the circumstances under which "a person" would be "relieve[d]" of "**liability** at common law or under State law," which is a clear reference to the consequences of a damages action. Thus section 4311(g) is not a reference to the entire body of state law. Instead, it relates to forms of damages liability whether pursuant to common law or statute (e.g., state product liability statutes, wrongful death statutes, state unfair practices law, etc.). These acts are not directly related to boat engines but rather are general in nature, and thus their preservation is not inconsistent with the pre-emption of state legislation specifically directed towards boat engine manufacturing. *Medtronic*, 116 S. Ct. at 2258 (tort law not pre-empted as it merely encompasses "the general duty of every manufacturer to use due care to avoid foreseeable dangers in its product"); *see also, Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186 (1988) ("the permission of incidental regulation is consistent with the preclusion of direct regulation").

2. Section 4311(g) preserves Petitioners' claims.

1. Respondent argues (Br. Resp. 32) that section 4311(g) merely provides for liability if a manufacturer complies with the Act; but that there can be no liability if there is no regulation or standard for the manufacturer to match. This conclusion defies the text of the Act. Since there is no Coast

Guard regulation on propeller guards, Respondent complies with the Act whether it provides a guard or not. This "[c]ompliance . . . does not relieve a person from liability at common law or under state law." 46 U.S.C. § 4311(g).[3]

2. The legislative history confirms that Congress preserved common law actions where the Coast Guard chose not to exercise its pre-emptive discretion. The Executive Director of the Boat Owners Association of the United States asked Congress to add a savings provision to the Act to ensure that "the failure of the Secretary to promulgate a standard shall not be admissible in a private proceeding. This would preclude a manufacturer from utilizing against the consumer the lack of a standard as evidence of a safe condition." *See* Br. Pet. 6-7. Congress responded by adding an express savings clause, and commenting that "[o]f course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissable [sic] for its evidentiary value." *See* Br. Pet. 7.

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[3] One of Respondent's *amici* relies upon three distinguishable cases to contend that "the Court has routinely given so-called 'savings' clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole." Br. General Motors ("G.M.") 25. Two of the cases analyzed statutes with pre-emption provisions much broader than section 4306. *See American Airlines v. Wolens*, 115 S. Ct. 817, 821 (1995) (pre-empting "any rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987) (pre-empting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); *compare* 46 U.S.C. § 4306 (pre-empting "a law or regulation" which a "State or political subdivision of a state" has "establish[ed]" for a narrow class of safety standards or equipment requirements). G.M. also relies on *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (U.S. Jan. 26, 1998), which turned upon the unique history of land acquisitions from a particular Indian tribe, and an interpretation of a savings clause that would eviscerate the very land sale agreement in which it was contained. By contrast, as shown herein, the operation of common law is wholly consistent with the text, purpose, and history of the Boat Safety Act.

Thus, at the time of the bill's drafting, Congress was presented with the very question at issue in this case: the pre-emptive scope of the Boat Safety Act in the absence of an applicable federal regulation. Faced squarely with this issue, Congress did not enact or otherwise provide any "clear and manifest intent" to pre-empt such laws as is required to find pre-emption. *Cipollone*, 505 U.S. at 516. Rather its response pre-supposes that a manufacturer "complies" with the Act in the absence of a regulation, and that litigation can go forward in the absence of a promulgated standard. Respondent's silence on this point speaks volumes.

The *amicus curiae* brief of the Solicitor General lends further support to Petitioners' view that the Coast Guard has not taken the steps necessary to pre-empt common law actions here. According to the government, "the congressional intent to achieve uniformity was not so absolute as to leave no room for common law actions." U.S. Br. 27. This is because, in part, the Boat Safety Act "does not require the Secretary to issue regulations, but rather merely permits him to." U.S. Br. 29 (distinguishing the "field pre-emption" case of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 [1978]).[4] Thus both the legislative body which wrote the Act, *and* the regulatory agency which operates under it, acknowledge that there is no express pre-emption of common law claims in this case.[5]

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[4] The Solicitor General declined to take a view on this question since he found that the Act does not expressly pre-empt *any* common law actions. U.S. Br. 10-12. The Coast Guard's no-pre-emption view – as expressed through the Solicitor General – is entitled to significant respect since this case is the Coast Guard's first pronouncement on the Act in this Court, and since it is consistent with the historic presumptions against pre-emption. *See* Br. Pet. 23.

[5] The Coast Guard's position on "kill switches" is identical, in that there is no federal regulation requiring them on boats. Although the Coast Guard has discouraged states from enacting a "prescriptive state rule requiring kill switches on motorboats, it has not taken the position that common law claims predicated on a failure by manufacturers to install such devices are preempted by federal law." U.S. Br. 20.

3. Respondent in effect wants it both ways: it acknowledges that the Act does not require (or prohibit) it from any action *vis-a-vis* propeller guards, but also argues that the Act precludes victims injured or killed by its products from recovering damages. It wants both the protections of the Act and freedom from the Act at the same time. Congress did not legislate such a result, however.

3. The effects of "common law" and "a law or regulation" are not identical.

1. Contrary to Respondent's assertions (Br. Resp. 22-29), damages actions do not exert a regulatory effect identical to positive law. A person who commits a common law tort is not violating a regulatory mandate or criminal statute; the tortfeasor is acting in a legal, but inappropriate way. The principal purpose of common law tort liability is thus to compensate victims; the effect which potential liability has on the tortfeasor is at best indirect. *See, e.g., Goodyear*, 486 U.S. at 185-186 ("[t]he effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of such an award provision"); *Silkwood v. Kerr-McGee*, 464 U.S. 238, 256 (1984) (tort awards not pre-empted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards. . . . ")

The violator of "a law or regulation," by contrast, is subject to liability *per se*, to administrative remedies, or even to criminal penalty. The effect on its actions are direct, since "a law or regulation" mandates action or the forbearance of action. Indeed, if a manufacturer of a consumer product violates positive regulatory requirements, the product can usually be removed from the market forthwith. The purpose of "a law or regulation" is thus to mandate conduct, with victim compensation being a secondary (and often elusive) byproduct. *Compare* 46 U.S.C. § 4311(a)-(d) (penalties under the Boat Safety Act for violating chapter or regulations prescribed thereunder).

2. This Court has repeatedly recognized that the express pre-emption of state laws or regulations does not necessarily

mean that state tort actions are pre-empted, because the two are not identical in nature or effect. In *Cipollone*, for instance, seven members of the Court held that, **although the 1965 Act expressly pre-empted state regulatory law, it did not pre-empt common law**, noting that "[t]here is no general, inherent conflict between [express] federal preemption of state [regulatory] requirements and the continued vitality of state common law damages actions." 505 U.S. at 518 (plurality); *id.* at 533-34 (concurrence). *See also, e.g., Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 626-628 (1996); *English v. General Electric Co.*, 496 U.S. 72, 85 (1990); *Goodyear, supra*; *Silkwood, supra*.[6]

This conclusion is particularly *apropos* in the context of product liability claims. While strict products liability may seek to improve product safety, one of its core principles is that because some potentially dangerous products will inevitably cause harm on occasion, it is often beneficial to society as a whole both to keep the product on the market **and** to compensate injured parties through the tort system. *Prosser & Keeton on Torts* 536-57, 692-93 (4th ed. 1984); *Morris on Torts* 240-41 (2d ed. 1980).

II. PETITIONERS' CLAIMS ARE NOT IMPLIEDLY PRE-EMPTED

A. Petitioners' Claims Promote the Ultimate Purpose of the Boat Safety Act: "Safety".

Congress enacted the Boat Safety Act to provide for safe products and boat operation. *See* Br. Pet. 3-5. Congress placed the burden of creating safe products on the manufacturers because, prior to that time, the "industry readily admits that one-fourth of all boat manufacturers d[id] not comply with . . . the industry's self-imposed minimum standards." *Id.* at 4-5. Congress felt that "equity requires that the responsibility at the outset for providing the boatman with a safe boat must lie

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[6] The Court need not reach the broader issue of common law's relation to a promulgated federal "law or regulation" since no propeller guard regulation exists here. *See Freightliner*, 115 S. Ct. at 1487, n. 3.

with the manufacturer." *Id.* at 3-4. Congress considered this piece of safety legislation appropriate since "[s]imilar federal legislation exists with regard to other products, including aircraft and motor vehicles." *Id.*[7]

This Act was also developed against the backdrop of existing common law, which has historically had input on safe product designs. In the case of boats, Congress knew that "[c]ourts have consistently held that a vessel owner's compliance with Coast Guard inspection requirements is not synonymous with 'seaworthiness' under maritime law." *See* Br. Pet. 7, n. 2 (testimony of Coast Guard Commandant in regard to the adoption of the savings clause). Indeed, it was well established by that time that the unseaworthiness doctrine was a "species of liability without fault." *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946). Thus common law was accepted to be compatible with federal boat regulation prior to the adoption of the Act, and its presence was recognized by Congress during the drafting of this legislation. *See* Br. Pet. 6-7. The lack of any "clear and manifest intent" to displace this historic remedy confirms that Congress did not mean to cavalierly or circuitously pre-empt it. *See Yamaha*, 116 S. Ct. at 628 (state "wrongful death" remedies are not pre-empted in case of nonseafaring accidents).

Respondent seizes upon Congress' desire to "encourag[e]" uniformity (*see* Br. Pet. 4), however, to broadly urge

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[7] As was stated when the bill was introduced for adoption:

> Over the last 5 years about 1,350 people each year have been killed while engaged in recreational boating. Excluding cars, this is a larger figure than for any other mode of transportation including civil aviation. Most deaths occur when boats capsize or people fall overboard. Boat safety requires that manufacturers construct their boats in such a way as to minimize these dangers.

117 Cong. Rec. 23,958 (July 8, 1971) (statement of Representative Latta). Thus the federal interests at stake in the Boat Safety Act are no different than in the federal interests behind the National Traffic and Motor Vehicle Safety Act of 1966 considered by this Court in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995).

that uniformity is the *ultimate* purpose of the Act. The main purpose of the Boat Safety Act, however, is *safety*. Common law actions help to promote this goal by identifying safer products and raising public awareness of the danger of unguarded propellers. Thus its operation encourages Congress' prime interest in this piece of legislation. Indeed, since Congress expressly commanded that common law liability survives pre-emption, it would frustrate Congressional purposes *to* pre-empt it here.

B. Congress Intended Only to "Encourage" the Goal of Uniformity, and Provided That It Be Encouraged Through the Actual "Establishment" of Standards.

1. Respondent is correct in stating that Congress gave the Coast Guard permissive authority to create uniform minimum construction standards through the "establishment" of federal standards. Br. Resp. 5, 14. Respondent stretches this argument, however, to assert that this desire to encourage uniformity pre-empts all common law claims *even in the absence of an "establish[ed]" federal regulation*. This slight-of-hand is incongruous with the text and history of the Act, however, and is contrary to this Court's prior decision in the analogous *Freightliner* case.

Congress clearly granted the Coast Guard the power to flex its pre-emptive muscle, *if it chose to do so*, through the actual enactment of regulations in accordance with the well-defined procedures of both section 4302 and the Administrative Procedure Act ("APA"). *See* Br. App. 5. Congress *required* that, in order to "establish" pre-emptive regulations, the Coast Guard must follow the terms of both section 4302 and the APA. *Id.* Congress further provided that, if any party is adversely affected by a standard prescribed under the Act, the aggrieved person is entitled to seek judicial review of the standard under the APA. *Id.*

In the case of propeller guards, the Coast Guard chose not to undertake the actions required to exercise its regulatory authority. Since it did not exercise its pre-emptive authority

as permissively granted to it by Congress, in the manner set forth by Congress, it is clear that Congressional purpose is not frustrated by the exercise of common law. Indeed Congressional purpose would be frustrated by the pre-emption of common law claims here, since the Act predicates all pre-emptive authority (and the right to seek protection from its exercise) upon the actual *enactment* of a federal regulation.

2. The flaw in Respondent's argument is thus exposed when it states that the savings cause would allegedly "defeat the statutory goal of *creating* uniform national boat construction and performance standards." Br. Resp. 45 (emphasis added). There is no frustration of any statutory goal here, however, since the Coast Guard *will still be free to create regulations in this area if it so chooses*. U.S. Br. 26-27.

The Supremacy Clause's purpose – enshrined in the Constitution at least a century before the rise of our national economy – is not to provide for uniformity among the states, but to establish the preeminence of federal law when necessary to support federal interests in the enforcement of national laws. *See, e.g., Medtronic*, 116 S. Ct. at 2257 ("it is impossible to ignore . . . [the] overarching concern [of the statutory and regulatory language] that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest"). In this Act, the federal interest is expressed through the Coast Guard's promulgation of national regulations in the manner expressly set forth by Congress. Since the Coast Guard chose not to prescribe a regulation under section 4302 and the APA as the Act dictates, the federal government has not expressed a pre-emptive interest concerning propeller guards (a conclusion which is forcefully underscored by the Coast Guard's position before this Court). *See Freightliner*, 115 S. Ct. at 1486. Petitioners' common law actions are simply not a bar to the full implementation of any federal propeller guard goal, *if and when the Coast Guard chooses to enunciate one*.

3. Respondent concedes that section 4311(g) "indicates, at most, Congress' intent not to occupy the entire field of boat safety, so that common law claims could continue to be brought in areas not covered by a federal safety standard." Br.

Resp. In Opp., 13. Respondent, apparently recognizing that its case hinges on establishing a "field pre-emption" argument, asserts that Congress intended to pre-empt the narrower field of "boat construction standards and equipment requirements." Br. Resp. 7. As noted above, however, there is no "field pre-emption" in this case since Congress expressly required the Coast Guard to actually prescribe regulations to flex its pre-emptive muscle. Pet. Br. 16-24; *see also, Freightliner*, 115 S. Ct. at 1486.

C. In the Absence of the "Establishment" of Federal Standards, Congress Intended Common Law Actions to Remain Viable.

1. Respondent argues (Br. Resp. 7) that courts should not allow a hodgepodge of requirements on boat manufacturers. Yet Respondent does not deny that the Coast Guard's decision to neither require nor prohibit propeller guards allows manufacturers to provide a myriad of guard designs, or no guards at all, in any hodgepodge manner they elect. Indeed, as noted in our opening brief (Br. Pet. 8-9) – and unchallenged by Respondent – a large number of propeller guards are presently marketed by manufacturers other than Respondent, further undermining Respondent's argument that this Court should affirm in the interest of "uniformity."[8]

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[8] Respondent argues (Br. Resp. 33-34) that manufacturers may be subjected to inconsistent "requirements" if their products operate in waters bounding two states, and thus common law claims should be pre-empted "by the Supremacy Clause." As noted above, the Supremacy Clause's purpose is not to create uniformity in-and-of itself, but to carry out federal interests. This Court rejected an identical argument in *Freightliner*, whose holding ultimately allowed for 18-wheel trucks (whose very purpose is interstate travel and commerce) to face potentially conflicting common law liabilities in various states for their use or non-use of anti-lock brake systems ("ABS"). This result was necessitated since there was no federal ABS regulation extant and thus "[a] finding of liability against [manufacturers] would undermine no federal objectives or purposes . . . since none exist." 115 S. Ct. at 1488.

2. Respondent admits that it can comply with both federal and state law, Br. Resp. 34, n. 24, so the analysis turns to whether common law actions would somehow frustrate the purposes of Congress here. Since the Coast Guard has neither required nor prohibited propeller guards, the question becomes whether Congress intended the courts to play any role in the matter or to be mere spectators. The text of the Act establishes that Congress intended the courts to play a role in the absence of federal regulation, and the history of tort law confirms that the courts are well suited and trustworthy to handle this public safety responsibility.

Indeed it is illogical to suggest that common law cannot assist in identifying feasible designs, given that the Coast Guard's adoption of a recommendation not to undertake regulatory action rested in part on concerns over costs, difficulty in retrofitting, and the purported lack of an available universal design which would fit the thousands of possible hull/propulsion unit combinations. App. 71, 163. If safer designs cannot be identified through product liability litigation, and manufacturers cannot be encouraged to provide such guards voluntarily through the tort system, this same quandary will always haunt the Coast Guard or indeed any regulatory agency charged with monitoring product safety.

3. Perhaps more importantly, courts have procedural and substantive guidelines by which these issues are routinely resolved. Manufacturers, by contrast, are businesses whose motivation is almost invariably the "bottom line," and absent tort law would operate in a wholly unregulated way, free (they contend) from liability whatsoever. More to the point, one of the reasons Congress had to enact the Boat Safety Act in the first place was because the "industry readily admits that one-fourth of all boat manufacturers do not comply with . . . the industry's self-imposed minimum safety standards." As Judge Learned Hand observed, an industry "never may set its own tests, however persuasive be its usages. . . . [T]here are precautions so imperative that even their universal disregard will not excuse their omission." *The T.J. Hooper*, 60 F.2d 737, 740 (2nd Cir.), *cert. den'd*, 287 U.S. 662 (1932).

4. Respondent's uniformity argument is thus based upon the invalid assumption that only manufacturers can determine the feasibility of propeller guards and that there is no role for the courts. Contrary to this unsupported assertion, Congress was fully cognizant of product liability claims at the time of the Act but did not evidence a "clear and manifest intent" to pre-empt their historic role in this field. This is because common law promotes, and does not undermine, the Congressional purposes established in the Act.

D. The Coast Guard Did Not Find that Propeller Guards Are Inherently Unsafe or Should Be Banned.

1. As the Solicitor General noted, "Respondent [in its Brief in Opposition to Certiorari] overstates what the Coast Guard decided with respect to propeller guards." U.S. Br. 25, n. 17. Undaunted, Respondent again overreaches on this point in its merits brief. Br. Resp. 11. The Coast Guard asked the National Boating Safety Advisory Counsel ("NBSAC") to consider whether it should "move toward a federal regulation for some form of propeller guard." App. 76. NBSAC delegated this task to an advisory subcommittee, which could not resolve all questions concerning cost, retrofitting, and the availability of a universal guard design which could be mandated for all boats. Faced with these unanswered questions, the subcommittee merely recommended that "no regulatory action" be taken on the subject. App. 73. The Coast Guard, based upon this recommendation, took no regulatory action under section 4302.

Respondent relies upon the advisory subcommittee's statement that propeller guards might possibly cause injuries themselves, and attempts to parlay this into a purported conclusion that propeller guards are inherently dangerous. Br. Resp. 11. While it is true that "[a]ll machinery or objects, whether created by man or nature, can inflict injury," App. 68, there is no evidence in the record of anyone ever actually being injured by a propeller guard. By contrast, the Red Cross estimates that more than 3,600 people are killed or injured by motorboat

propellers on average ***every year***. App. 198. Indeed, Respondent admits that its unguarded, open-screw propeller blade may be an open and obvious danger. App. 23.

If the Coast Guard had found all propeller guards to be inherently dangerous, as Respondent would have this Court believe, it would have been the Coast Guard's duty to ban such products and stop them from being sold as aftermarket accessories. It also would have presumably warned the users of such products that they were using inherently dangerous products.[9] Contrary to Respondent's position, the Coast Guard declared (in the *same* letter adopting the recommendation to take no regulatory action) that "[a] series of articles in our Boating Safety Circular will be developed aimed at avoiding boat/propeller strike accidents. *Topics could include, for example . . . , available propeller guards. . . .* " App. 165 (emphasis added).

2. Also, contrary to Respondent's assertions, the record reflects that the technology required to protect swimmers from propeller injuries has existed since at least 1970. App. 210. Respondent's own principal engineer for motorboat product evaluation concluded in a 1988 internal memorandum that "we are very close to the solution of what needs to be the configuration of the prop guard." App. 214-215. At least 21 patents have been awarded for propeller guards since 1910, which itself generates a presumption that the inventions are feasible. App. 205-206. Propeller-less water pump ("jets") propulsion devices are currently sold in the marketplace as well, and Respondent has tested such products since at least 1973. App. 202-204. The devices sought by Petitioners are thus products which are sold in the marketplace; which are used by consumers (including various branches of the United States Government and the State of California); and which Respondent has been testing for at least 25 years. App. 213-218.[10]

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[9] Users referenced in the subcommittee report include the United States Navy and Marines; rescue teams in California, New Zealand and Australia; and over 2,000 owners of "Chadwell" ring guards. App. 62-64.

[10] Contrary to Respondent's assertion, Br. Resp. 12, not all courts have concluded that there is no feasible propeller guard available to protect

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Respondent's interpretation of the Act – that all common law actions are pre-empted where the Coast Guard has considered a safety item but not issued a final regulation – would pre-empt actions on all safety features where the Coast Guard published a notice of proposed rulemaking (or otherwise recognized its existence) but ultimately, for whatever reason, did not enact a final regulation. Thus, all common law actions for safety items such as neutral returns, "kill switches," and other safety innovations on boats would be pre-empted as well. The implications of Respondent's assertions thus go well beyond the compensation of Kathee Lewis' parents in this single case; it would deprive countless victims of boat-related torts from seeking compensation and assisting in the identification of safer products. Congress did not legislate such a devastating and abhorrent result.

III. CONCLUSION

For the reasons stated in our briefs, the decision below should be reversed and the case remanded for trial.

Respectfully submitted,

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victims in the water. *See, e.g., Fitzpatrick v. OMC*, No. 82-9635 (Pa. Ct. Of Common Pleas, Jan. 28, 1985) (*see* App. 240-241). Also, as the record reflects, Respondent's argument is misleading due to the number of lawsuits which settle for undisclosed amounts of money (App. 239) and the number of summary judgments manufacturers have obtained on the pre-emption issue (as in this very case). *See* App. 247-254.